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Supreme Court, U.S.
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No. 99-1429

IN THE
Supreme Court of the United States

ANADARKO PETROLEUM CORPORATION, ET AL.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the D.C. Circuit correctly construed the Natural Gas Policy Act of 1978 to require natural gas producers who unlawfully collected hundreds of millions of dollars from consumers between 1978 and 1992 in violation of Section 110(a)(1) of the Act—which was repealed effective January 1, 1993—to refund a portion of those amounts to consumers with interest thereon.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, Respondents Public Service Company of Colorado and Cheyenne Light, Fuel and Power Company note that 100% of the stock of both companies is owned by New Century Energies, Inc.

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BRIEF IN OPPOSITION

Respondents Public Service Company of Colorado and Cheyenne Light, Fuel and Power Company (collectively, "PSCC") respectfully request that the Court deny the petition for a writ of certiorari filed in this case.

INTRODUCTION

In this case, petitioners seek this Court's review of a 1996 D.C. Circuit decision in which the court ordered petitioners—who are producers of natural gas—to refund amounts they unlawfully collected from their customers in connection with natural gas sales transactions. This Court in 1997 denied a petition for certiorari filed by Amoco Production Company (one of the petitioners here) and other producers seeking review of that 1996 decision. The petitioners here also seek review of a 1999 D.C. Circuit decision upholding a

decision of the Federal Energy Regulatory Commission ("FERC") denying petitioners a blanket waiver of their obligation to pay interest on the unlawfully collected amounts. That petitioners collected from their customers hundreds of millions of dollars in Kansas *ad valorem* taxes is not in dispute. Nor is it disputed that petitioners could not lawfully exceed the statutory price ceiling to collect such amounts. Only petitioners' obligation to refund any unlawfully collected amounts, plus interest, is at issue here.

Both of the D.C. Circuit decisions that petitioners would have this Court review are fact-bound and were rendered in the context of a statutory scheme that Congress repealed in 1989, with the repeal completely effective in 1993. And notwithstanding petitioners' claims to the contrary, the 1996 decision broke no new legal ground but merely applied settled retroactivity and administrative law principles. Nor is there any conflict between the D.C. Circuit's decisions and the decisions of this Court or any other court, but even if there were the conflict would be of only historic interest, given the repeal of the statute involved. Quite simply, the decisions below raise no novel or important issues calling for this Court's intervention. Accordingly, further review by this Court of the 1999 decision below or the prior 1996 decision is clearly unwarranted.

COUNTERSTATEMENT

This case involves the interpretation of a statutory provision repealed by Congress in 1989 as applied to "ancient transactions." Pet. App. 69a. During the 15 years it was in effect, Title I of the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3311-33 (1988), *repealed*, Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, § 2(b), 103 Stat. 158 (1989) (Pet. App. 159a), imposed a "maximum lawful price" on the sale of natural gas by natural gas producers. Section 110(a)(1) of the NGPA, 15 U.S.C. § 3320(a)(1) (Pet. App. 163a), however, permitted producers

to charge their customers an amount exceeding the maximum lawful price on first sales of natural gas to the extent necessary to recover "[s]tate severance taxes attributable to the production of such natural gas and borne by the seller." When enacted in 1978, the NGPA represented a "substantially new regulatory regime" for the pricing of natural gas from the one that had preceded it under the Natural Gas Act ("NGA"), 15 U.S.C. § 717 *et seq.* Pet. App. 95a. *Accord* Pet. App. 108a ("In 1978 Congress substantially overhauled federal regulation of natural gas prices by adopting the NGPA.").

Prior to the adoption of the NGPA, FERC's predecessor agency, the Federal Power Commission ("FPC"), had concluded that Kansas' *ad valorem* tax was a severance tax for purposes of the NGA. Pet. App. 2a, 105a-106a. In 1986, FERC concluded that the Kansas tax qualified as a severance tax under Section 110(a)(1) of the NGPA, drawing on the FPC's view of the tax under the NGA. Pet. App. 2a-3a, 108a-109a. In 1988, however, the D.C. Circuit held that FERC's conclusion "fell short of reasoned decision-making." *Colorado Interstate Co.* v. *FERC*, 850 F.2d 769, 770 (D.C. Cir. 1988) (Pet. App. 104a). The court therefore remanded the case to FERC for further proceedings. Meanwhile, as noted, Congress in 1989 repealed Title I of the NGPA, including Section 110(a)(1); this repeal became effective on January 1, 1993. Pet. App. 3a & n.2.

In 1993, FERC issued its post-remand decision in which it concluded that the Kansas *ad valorem* tax was *not* a severance tax within the meaning of Section 110(a)(1) of the NGPA and therefore producers could *not* charge their customers a price above the maximum lawful price to recover the Kansas tax. FERC then ordered the producers to refund all amounts unlawfully collected since June 28, 1988, the date on which the D.C. Circuit had issued its *Colorado Interstate* opinion, which, in FERC's view, was the date the

producers were put on notice that the Kansas tax might not be recoverable under Section 110(a)(1). Pet. App. 3a, 75a.

In 1996, the D.C. Circuit agreed with FERC's reconsidered view that the Kansas *ad valorem* tax did not qualify as a severance tax under Section 110(a)(1) but disagreed with the agency's limitation of the producers' refund obligation to 1988. *See Public Serv. Co. of Colo.* v. *FERC*, 91 F.3d 1478 (D.C. Cir. 1996) (Pet. App. 71a-102a) ("*Public Service*"), *cert. denied*, 520 U.S. 1224 (1997) (Nos. 96-954 & 96-1230). The D.C. Circuit held that "[a]bsent detrimental and reasonable reliance [on the part of the producers], anything short of full retroactivity (*i.e.*, to 1978) allows the producers to keep some unlawful overcharges without any justification at all," and that Congress could not have "intended to grant the agency the discretion to allow so capricious a thing." *Public Service*, 91 F.3d at 1490 (Pet. App. 96a). Rejecting the producers' claim that they had relied to their detriment on the prior rulings of the FPC and FERC, the D.C. Circuit explained that the producers could not have relied because there was nothing they could have "done differently if they had known in 1983 that they were not entitled to recover the Kansas tax," and that even if they had relied, "[t]he enactment of a substantially new regulatory regime in 1978 undermined any assurance that the FPC's treatment of the Kansas tax under the NGA would withstand scrutiny under the NGPA" and thus any reliance on the producers' part would have been unreasonable—indeed, it "would have been foolhardy." *Id.* (Pet. App. 94a, 95a).

Although the producers could have been ordered "to refund the full amount they unlawfully collected" since 1978, the D.C. Circuit decided that it would not "require refunds of taxes recovered with respect to production before October 1983," because that was "the earliest date advocated by any party before this court." *Id.* (Pet. App. 95a, 96a).

This Court denied a petition for certiorari filed by these same producers' seeking review of the D.C. Circuit's *Public Service* decision in which the issue presented was virtually identical to that presented here. *See Amoco Prod. Co.* v. *Public Serv. Co. of Colo.*, 520 U.S. 1224 (1997) (No. 96-954). (The Court also denied the petition for certiorari filed by Williams Natural Gas Company from the 1996 decision. *See Williams Natural Gas Co.* v. *Amoco Prod. Co.*, 520 U.S. 1224 (1997) (No. 96-1230).)

The producers' obligation to refund amounts unlawfully collected since October 1983 having been conclusively resolved in the courts, the producers in 1997 asked FERC to grant a "blanket" or "across-the-board" waiver of the requirement that interest be paid on those amounts. Pet. App. 4a, 52a. In support of that request, the producers advanced the same equitable arguments they had deployed in an effort to avoid their underlying refund obligation. Pet. App. 8a, 22a, 46a-47a.

FERC denied the request for a blanket waiver, noting (1) its "normal and customary" policy requiring payment of interest on refunds, Pet. App. 26a (citing *Natural Gas Policy and Procedures, FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,083, at p. 30,546 (1979), *aff'd, United Gas Pipe Line Co.* v. *FERC*, 657 F.2d 790 (5th Cir. 1981)); (2) its regulation making unlawful NGPA collections subject to refund with interest, Pet. App. 21a (citing 18 C.F.R. § 270.101(2)(e)); and (3) the fact that granting such a waiver would be inconsistent with the D.C. Circuit's *Public Service* decision. On this third point, the agency explained that "[w]e find the court's holding on detrimental reliance instructive and indicative of the analysis required on whether the Commission should, or could, waive interest on overcharges." Pet. App. 48a.

Although it denied a blanket waiver, FERC said it would entertain individual requests for relief by specific producers

who could show that payment of interest would present a serious financial problem. Pet. App. 21a-22a, 52a.

The D.C. Circuit in its 1999 *Anadarko* decision upheld FERC's refusal to waive the producers' interest obligation. *See Anadarko Petroleum Corp.* v. *FERC*, 196 F.3d 1264 (D.C. Cir. 1999) (Pet. App. 1a-14a), *vacated in part on reh'g*, 200 F.3d 867 (D.C. Cir. 2000) (Pet. App. 68a-70a), *petition for cert. filed*, 68 U.S.L.W. 3566 (Feb. 28, 2000) (No. 99-1429). The D.C. Circuit noted that "[t]he Commission's general policy, in effect for many years, requires interest to be paid on various kinds of overcharges," and that, "[a]s the Commission has recognized, interest is simply a way of ensuring full compensation." 196 F.3d at 1267, 1268 (Pet. App. 6a, 7a). The court also noted that "the regulation governing price increases for the recovery of severance taxes gave notice that any such increases were 'subject to a general obligation to refund any portion of the price, together with interest.' " *Id.* at 1267 (Pet. App. 7a) (quoting 18 C.F.R. § 270.101(2)(e)).

The D.C. Circuit in *Anadarko* held that it "cannot be doubted" that FERC "correctly read our *Public Service* opinion" to require rejection of the producers' "equitable" arguments in support of their interest blanket waiver request. 196 F.3d at 1268 (Pet. App. 8a). As the court explained:

> We there rejected the producers' equitable arguments against full refunds back to 1983, arguments the producers now repeat in support of their request for a generic waiver of interest regarding the same period. In holding that the producers "must refund the full amount that they unlawfully collected," 91 F.3d at 1490, we determined that the producers had not established "detrimental reliance," *id.*; that even if they had relied on the Commission's treatment of the Kansas tax, passage of the NGPA and the 1983 petition challenging this treatment rendered their reliance unreasonable, *id.*, and that "we are hard pressed to see how the producers would be harmed in any

> cognizable way even if they were required to disgorge every dollar they received in recovery of the tax," *id.* In view of these and other portions of our *Public Service* opinion, the Commission properly concluded that it should not grant a generic waiver of interest because, to do so, it would have to assess the equities in a manner contrary to *Public Service*. [*Id.* (Pet. App. 8a-9a) (footnote omitted).]

The petition for certiorari now before the Court seeks this Court's review of the D.C. Circuit's 1996 *Public Service* decision—as to which the Court has already denied the writ—on the issue of the producers' obligation to refund unlawfully collected amounts as well as the court's 1999 *Anadarko* decision on the issue of the producers' obligation to pay interest on such amounts.

REASONS FOR DENYING THE WRIT

This Court's Rules establish that "certiorari will be granted only for compelling reasons." S. Ct. R. 10. The two D.C. Circuit decisions at issue here, however, raise no compelling issues calling for the exercise of this Court's discretionary certiorari power since they conflict with no other decision by any court; were rendered in the context of a statutory scheme that no longer exists; involve fact-bound applications of settled legal principles; and have had no influence on other courts. The two decisions are also correct. Thus, further review of this long drawn-out litigation by this Court plainly is not warranted.

1. The first question presented by petitioners is predicated on an insupportable view of the D.C. Circuit's 1996 *Public Service* decision—*i.e.*, that "the D.C. Circuit declined to accord any deference to FERC's exercise of remedial discretion" and "appeared to believe that FERC was not entitled to deference on the question of remedy when applying a new rule of law retroactively." Pet. 15-16. Such a reading hardly leaps from the pages of the D.C. Circuit's opinion. On the

contrary, one will read, and reread, *Public Service* in vain for language creating an "exception to the general rule of *Chevron* deference when agencies interpret statutory provisions providing them with remedial discretion." Pet. 4 (referring to *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

Petitioners make a mountain out of a molehill. In *Public Service*, the D.C. Circuit made no new law with respect to an agency's discretion to impose remedies prospectively or the amount of deference a reviewing court should give such agency action. What petitioners overlook is the role of retroactivity law in the D.C. Circuit's decision. Thus, petitioners' view of the case—the view on which their entire petition rests—is simply wrong.

The D.C. Circuit began its retroactivity analysis with the observation that "[t]he governing principle is that when there is a 'substitution of new law for old law that was reasonably clear,' the new rule may justifiably be given prospectively-only effect in order to 'protect the settled expectations of those who had relied on the preexisting rule.' " 91 F.3d at 1488 (Pet. App. 89a-90a) (quoting *Williams Natural Gas Co.* v. *FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993)). Applying that principle, the D.C. Circuit concluded that the producers had not, in fact, relied on a prior rule, and if they had, such reliance would have been "foolhardy"; therefore, "full retroactivity" was required. *Id.* at 1490 (Pet. App. 95a, 96a). And the court could not agree that "Congress intended to grant the agency the discretion to allow so capricious a thing" as "allow[ing] the producers to keep some unlawful overcharges without any justification at all." *Id.* (Pet. App. 96a). Thus, the D.C. Circuit made the correct decision, fully in keeping with the law of retroactivity, and without any violation or modification of *Chevron* principles.

Nor did the D.C. Circuit's 1999 decision in *Anadarko* break any new legal ground. There, the court upheld FERC's

refusal to grant the producers' request for an across-the-board waiver of the accumulated interest on the amounts overcharged. FERC recognized that it was "not writing upon a clean slate." Pet. App. 46a. Since the producers were repeating the very same equitable arguments they had made in *Public Service* in an attempt to avoid refund liability altogether, and since the D.C. Circuit had squarely rejected those arguments, FERC also saw itself as constrained to reject them in connection with the producers' request for a blanket waiver of interest. The D.C. Circuit agreed with FERC's assessment:

> That the Commission correctly read our *Public Service* opinion cannot be doubted. We there rejected the producers' equitable arguments against full refunds back to 1983, arguments the producers now repeat in support of their request for a generic waiver of interest regarding the same period. [196 F.3d at 1268 (Pet. App. 8a).]

Thus, *Anadarko*'s holding with respect to the producers' obligation to pay interest followed logically from the legally-controlling reasoning of *Public Service*. It would have been an abuse of discretion for FERC to grant a blanket waiver of interest on the basis of arguments already rejected by the D.C. Circuit in *Public Service*.

2. Petitioners claim that the 1996 *Public Service* decision "wreaks havoc in an important area of federal law" and has "consequences * * * [that] reach beyond this case." Pet. 4, 5. This claim cannot be taken seriously.

First, no matter how one views the holding of *Public Service*, that holding is confined to the context of the specific statute at issue in that case—the NGPA. *See Exxon Co., U.S.A.* v. *FERC*, 182 F.3d 30, 48 (D.C. Cir. 1999) ("The *Public Service Co.* decision was made in the context of the Natural Gas Policy Act."). And Title I of the NGPA was, of course, repealed effective January 1, 1993. There is no compelling reason for this Court to review the D.C. Circuit's

interpretation of a repealed statute. *See District of Columbia* v. *Sweeney*, 310 U.S. 631, 631 (1940) (petition for certiorari "denied in view of the fact that the tax is laid under a statute which has been repealed and the question is therefore not of public importance").

Second, in the more than three and a half years since *Public Service* was decided, it has been cited only four times outside of this litigation, three times by the D.C. Circuit and once by the Fifth Circuit. *See Appalachian Power Co.* v. *EPA*, 135 F.3d 791, 817 n.39 (D.C. Cir. 1998); *Microcomputer Tech. Inst.* v. *Riley*, 139 F.3d 1044, 1050 (5th Cir. 1998); *Exxon Co., U.S.A.* v. *FERC*, *supra*, 182 F.3d at 48-49; *Washington Water Power Co.* v. *FERC*, 201 F.3d 497, 503 (D.C. Cir. 2000). In each instance, *Public Service* was cited in support of an unremarkable proposition.

None of these cases supports petitioners' interpretation of *Public Service* as a landmark decision in which the D.C. Circuit created a novel exception to the *Chevron* rule. If they had, petitioners would have cited these cases in their petition (which they did not). In fact, the *Exxon* court, contrary to petitioners' extreme reading of *Public Service*, affirmed that FERC "does have a measure of discretion" in deciding whether to make a new remedial rule retroactive and may order prospective-only relief if "considerations properly within its ambit counsel" such action. 182 F.3d at 49.

Another reeent D.C. Circuit decision—one that does *not* cite *Public Service*—is also quite instructive. *See Connecticut Valley Elec. Co.* v. *FERC*, __ F.3d __, No. 98-1294, 2000 WL 347453 (D.C. Cir. Apr. 14, 2000). In that case, FERC denied all relief—both retroactive and prospective—for an undisputed violation of the Federal Power Act. The D.C. Circuit—in an opinion written by Judge Ginsburg, the author of *Public Service*—held that FERC's "decision to deny any relief was a valid exercise of its remedial discretion." *Id.* at *1. In so doing, the D.C. Circuit indicated that when FERC

administers a statute under which it has remedial discretion, the agency's exercise of that discretion is judicially reviewable only for abuse. *See id.* at *6-*7.

Connecticut Valley thus demonstrates that *Public Service* did not disturb established remedial discretion principles. Even after *Public Service*, the law in the D.C. Circuit is that if a statute confers remedial discretion upon an agency (which the NGPA does not), the abuse of discretion standard applies. Instead, *Connecticut Valley* confirms the proper, and limited, interpretation of *Public Service*. All that the court held in *Public Service* was that FERC lacked discretion to award less than full refunds (to the extent requested) because anything less would have conflicted with the price ceilings mandated by Congress in the NGPA and also would have been inequitable given the producers' total lack of reliance. Contrary to petitioners' contention, if *Public Service* had dramatically changed the law with respect to judicial review of agency remedial discretion, Judge Ginsburg surely would have said so in *Connecticut Valley*, or at least cited *Public Service*. He did not.

Third, it should not go unnoticed that the Government did not seek this Court's review of *Public Service* after it was decided in 1996, even though other parties did. Were that case really the alarming abridgement of agency authority petitioners make it out to be, it is fair to assume the Solicitor General would have sought reversal of the D.C. Circuit's judgment. He did not.

3. Petitioners assert (Pet. 18-19) that the D.C. Circuit's decisions conflict with several other court of appeals cases. Petitioners offer a string of citations with but a cursory parenthetical explanation of each alleged conflict. Upon examination, however, none of the alleged conflicts pans out.

Two of the decisions petitioners cite do not even involve FERC or the NGPA (and one of those was rendered by a court that no longer exists). *See Laborers' Int'l Union of N.*

Am., AFL-CIO v. *Foster Wheeler Corp.*, 26 F.3d 375 (3d Cir.), *cert. denied*, 513 U.S. 946 (1994); *Atlantic Richfield Co.* v. *U.S. Dep't of Energy*, 977 F.2d 611 (Temp. Emer. Ct. App. 1992), *cert. denied*, 507 U.S. 910 (1993).

Another case petitioners cite, *Transcontinental Gas Pipe Line Corp.* v. *FERC*, 998 F.2d 1313 (5th Cir. 1993), involved the NGA, not the NGPA, a statute conferring upon FERC considerably greater remedial discretion than the NGPA. As the D.C. Circuit noted in *Public Service*:

> [T]he key point [made by PSCC] is that the Commission does not have the expansive remedial powers under the NGPA that it wielded under the NGA, 15 U.S.C. § 717c. Specifically, whereas the NGA gave the Commission discretion to order refunds if it determined that a rate was not just and reasonable, the NGPA established maximum lawful prices and gave the customer a right to a refund if it was overcharged. [91 F.3d at 1489-90 (Pet. App. 93a-94a).]

In *Southern Natural Gas Co.* v. *FERC*, 813 F.2d 364 (11th Cir. 1987)—which petitioners cite with a "Cf."—the court required the producer to fully refund the excess amounts it collected from its customers and thus is of no help to petitioners. And in the quotation petitioners extract—" '[t]he ultimate balance of equitable consideration is committed to the Commission's discretion' "—the Eleventh Circuit was actually quoting a much earlier case decided under the NGA. *Id.* at 368 (quoting *Gillring Oil Co.* v. *FERC*, 566 F.2d 1323, 1326 (5th Cir.), *cert. denied*, 439 U.S. 823 (1978)). Indeed, *Southern Natural* itself was decided under the NGA. *See* 813 F.2d at 368 n.9 (citing 15 U.S.C. § 717r).

Finally, *Texas Eastern Transmission Corp.* v. *FERC*, 769 F.2d 1053 (5th Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986), far from conflicting with *Public Service*, actually supports that decision. Section 110(a)(2) of the NGPA (the statutory neighbor of the section involved here, Section

110(a)(1)) permits producers to exceed the maximum lawful price of natural gas in order to recover certain production-related costs. *See* 15 U.S.C. § 3320(a)(2) (Pet. App. 163a). In *Texas Eastern*, FERC issued orders implementing Section 110(a)(2) and permitting producers to recover such costs retroactive to 1980, when FERC first announced its intention to regulate in this area. Before the Fifth Circuit, the producers objected to FERC's "failure to make all production-related allowances recoverable retroactive to 1978, the year of the NGPA's passage." *Id.* at 1066. Other parties argued that "the allowances should be collectable only from 1983," when FERC issued its final rule on the subject. *Id.* But the Fifth Circuit upheld FERC's decision to make recovery of production-related costs retroactive only to 1980 as "a fair balancing of the various problems involved." *Id.* Thus, in *Texas Eastern*, as in *Public Service*, the court sustained FERC's application of a new rule on a partially-retroactive basis.

4. Petitioners also contend (Pet. 23) that *Texas Eastern* conflicts with *Anadarko* on the interest issue. Not so. First, contrary to petitioners' assertion, *Anadarko* does not hold that FERC lacks "authority to deny interest when it orders refunds." Pet. 23. Rather, the D.C. Circuit simply agreed with FERC's assessment that the *Public Service* court had already rejected the equitable arguments advanced by the producers and hence granting a blanket waiver of interest based on those same arguments would be inconsistent with *Public Service*. Second, the Fifth Circuit's decision to uphold FERC's failure to assess interest in *Texas Eastern* was based on "the specific circumstances of th[at] case," with the court concluding that FERC had reached "a fair result" "within its discretion." 769 F.2d at 1066. On the particular facts here, denying interest would not be fair but rather would be an abuse of FERC's discretion. And third—fully supporting the decision below—*Texas Eastern* recognizes that FERC has a "general policy favoring interest." *Id.* at

1066 n.28. FERC's adherence to that policy in this case is unremarkable.

Nor is there any conflict between *Anadarko* and *Estate of French* v. *FERC*, 603 F.2d 1158 (5th Cir. 1979), an NGA case. Both the D.C. Circuit and FERC considered *French* and concluded that it did not support a waiver of interest in this case. *See Anadarko*, 196 F.3d at 1269 (Pet. App. 9a) (*French* "does not favor a different outcome"); Pet. App. 51a (FERC decision) (*French* "is inapposite").

In *French*, a producer overcharged its customers on gas sales from 1959 to 1964 and was ordered by FERC to provide refunds with interest. In 1971, the producer petitioned FERC to relieve it of the refund obligation and toll the accumulation of interest pending the disposition of its petition, but FERC in 1978 denied the requests. The Fifth Circuit held that the seven years it took FERC to rule on the petition amounted to unreasonable delay and warranted waiver of interest for the period 1971-1978; the court did not, however, relieve the producer of its obligation to refund the amounts it had overcharged its customers—plus the interest accumulated on the overcharges up to 1971. *See* 603 F.2d at 1167-68. In this case, unlike *French*, there was not a significant delay between the producers' request for relief from interest and FERC's denial of that request. *See Anadarko*, 196 F.3d at 1269 (Pet. App. 9a) ("Here, by contrast, the Commission acted quite promptly on the producers' petition for a waiver of interest."). The producers filed petitions in May and June 1997, and the petitions were denied in September 1997. Pet. App. 40a, 43a-44a, 52a.

Finally, *Osterneck* v. *Ernst & Whinney*, 489 U.S. 169 (1989), also cited by petitioners (Pet. 21), has no bearing whatsoever on this case. The question there was "whether a motion for discretionary prejudgment interest filed after the entry of judgment constitutes a Rule 59 motion to alter or amend the judgment and renders ineffective any notice of

appeal filed before a ruling on that motion." *Id.* at 170. And the prejudgment interest factors that petitioners make much of were mentioned by the Court only as an example of considerations "in a federal securities action such as this case." *Id.* at 176. Petitioners also fail to mention that in a footnote the Court made clear that "[w]e do not intend here to specify what factors a district court must consider when deciding under federal law whether to grant prejudgment interest." *Id.* at 176 n.2.

At bottom, whether FERC should have waived the producers' obligation to pay interest on the amounts they unlawfully collected is a fact-bound determination that both the court and agency below resolved against the producers; further review of that issue is thus unwarranted. *See, e.g., Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996); *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *United States* v. *Doe*, 465 U.S. 605, 614 (1984). There is absolutely no reason to believe that *Anadarko*'s interest holding will have a "damaging impact" (Pet. 26) on other courts. To date, *Anadarko* has never been cited by any court.

* * *

Three years ago, this Court declined the opportunity to review the D.C. Circuit's *Public Service* decision, *see Amoco Prod. Co.* v. *Public Serv. Co. of Colo.*, 520 U.S. 1224 (1997) (denying certiorari in No. 96-954), and there is no reason for the Court to revisit that case now. As petitioners themselves have said, this "litigation has gone on forever" (Pet. App. 7a), and this Court should not prolong its conclusion.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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